SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1034

GEORGE F. DRISCOLL COMPANY,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

JOSEPH J. COTTER,
JAMES C. ROGERS,
ARTHUR J. PHELAN,
Counsel for Petitioner.

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IN THE

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No. 1034

GEORGE F. DRISCOLL COMPANY, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

George F. Driscoll Company, a corporation, respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the Court of Claims of the United States in the above entitled case (its Docket No. 45455) entered October 1, 1945 (R. 38) denying recovery to petitioner.

Opinions Below

The opinions of the Court of Claims (R. 22-38) are not yet officially reported.

Jurisdiction

The judgment of the Court of Claims was entered October 1, 1945 (R. 38). Motion for new trial was filed, and said motion was denied January 7, 1946 (R. 38). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended.

Contract Provisions Involved

Contract provisions involved in this case are Article 10 (R. 12) and Article 15 (R. 14) of the United States Standard Form of Contract.

Summary Statement of Matter Involved

This was a suit to recover the reasonable cost of work done, namely, the repairing of a broken water main, for the benefit of the United States. The break was the result of an accident. The work of repairing it was outside of any express contract that petitioner had with the United States.

Petitioner is a general contractor. On October 22, 1934 it was awarded a contract for the construction of certain buildings and alterations of others at the United States Immigration Station, Ellis Island, New York. During the course of its work a number of wood piles were required to be driven at specified locations. After a number of the piles had been driven on 6-foot centers, petitioner approached a point where it became apparent that the next pile to be driven would be directly over or very close to the apparent location of an underground water main. This supposed location was determined by both petitioner's engineers and the government engineers by sighting a straight line between two known points of the main. One of these points was a mark on the seawall where the main entered the island, and the other a vertical riser 100 to 125 feet inland.

The work was stopped and a conference was held between petitioner's engineers and those of the government, and the government's engineer determined to change the location of the next pile to be driven. He indicated the place where he wanted the next pile to be driven (R. 27). Petitioner, following instructions given by respondent's engineer, probed with a rod over the place selected for driving the pile to determine whether or not the main was below the point designated (R. 27). After the probing was completed, and it was concluded the main was not below the area where the pile was to go, respondent's assistant construction engineer authorized petitioner to drive the pile at the point indicated. The pile was driven in the presence of respondent's construction engineer, as was required by the specifications (R. 22).

The only information available as to the depth of the main at the point of the probing came from the government's superintendent of Ellis Island, who said he thought it was down about 10 feet below grade. Petitioner probed down to a depth of 16 feet 6 inches. Subsequent events showed the main was 16 feet 9 inches below grade (R. 27).

Later in the day it developed that the water pressure on Ellis Island was dropping and it looked as though the water main had been broken by the pile in question. The next morning there was no water supply on the island, and many buildings, including a hospital, were in urgent need of water. It was then a certainty that the pile had broken the main. Clearly, an emergency existed. Respondent's construction engineer orally instructed petitioner to proceed to repair the broken main at once, which it did as quickly as possible. Petitioner never received any specific order in writing for the work. The main was broken on May 1, 1935. It took approximately one week, working twenty-four hours a day, to make the necessary repairs. Many difficulties were encountered. It was necessary to employ a diver to com-

plete the repairs after sea water had broken through the excavation. In the meantime, petitioner hauled water by tugboats from New York City to the island, and extended one thousand feet of fire hose from the Jersey shore to the island and water was supplied through the hose.

The question then arose as to whether petitioner was legally liable to pay for the damage that resulted from the accidental breaking of the main.

On May 3, 1935, two days after the break, plaintiff, in writing, advised respondent that it expected to be reimbursed for all costs of repairs made necessary by the break. R. 28). On May 11 respondent's chief engineer wrote petitioner that it was his opinion there could be no claim for additional compensation for the repair of this damage because if the provisions of paragraphs 987, 988, 989 and 1003 of the specifications had been followed the damage to the water main would not have occurred. Those paragraphs of the specifications have no application whatsoever to the situation that confronted both petitioner's engineers and those of respondent on May 1, 1935 when the pile was driven. (See Special Finding of Fact No. 5, R. 23-25). Petitioner was not required under its contract to touch the horizontal main. (See R. 26 and Par. 1075 of specifications, R. 24).

Cleanup work following the repairs was done at various times up to May 29, 1935. On June 5, 1935 petitioner wrote the Procurement Division, Public Works Branch, Treasury Department, the department of the government issuing the contract, requesting payment for the work incident to the repair of the main. Petitioner's contract was signed by the Acting Director of Procurement, Treasury Department (R. 20). On September 16, 1935 the Acting Assistant Director of Procurement wrote petitioner that the additional expense incurred in the repair of the main would have

to be assumed by petitioner, but said, "This office will interpose no objection, in the event you desire to present an appeal from this decision to the Office of the Comptroller General of the United States."

The Procurement Division of the Treasury Department made no suggestion that petitioner appeal to the Secretary of the Treasury. There seems to be confusion in the opinions below as to whether the Construction Engineer or the Director of Procurement was the Contracting Officer, and there is no finding of fact as to this.

Acting upon the suggestion of the Assistant Director of Procurement, petitioner submitted the matter to the Comptroller General who, on May 12, 1939, denied petitioner's claim. Petitioner then instituted suit in the Court of Claims of the United States, seeking to recover its costs incident to repairing the main. It alleged that the breaking of the main was not due to any negligence or want of care on its part (R. 3).

Petitioner's contract was the Standard United States Government Form of Contract. It contained the usual provision that

> "* * * all other disputes concerning *questions arising under this contract* shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime, the contractor shall diligently proceed with the work as directed."

The contract also provides that "The contractor shall, * * * be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work * * *" (R. 12).

There is no dispute between the parties as to the reasonableness of petitioner's costs incident to the work involved, nor is there any dispute in the case as to any of the essential facts.

This case was reached for trial in the court below (see Rules 88 and 89 of the Court of Claims of the United States) on October 4, 1944, and was argued and submitted (R. 21). On January 8, 1945 the Court of Claims remanded the case to its general docket and reset it for oral argument on February 5, 1945. However, by order of the court on January 19, 1945 the remand order was revoked (R. 21). On October 1, 1945 the court below entered special findings of fact, conclusions of law based thereon, and its opinion (R. 22).

There were four opinions filed in the case (R. 22-38). One opinion, filed by Judge Littleton, held that the petitioner could not recover because the contracting officer, on the facts as he interpreted them, decided "the dispute", that is, who was to respond in damages for the breaking of the water main, against petitioner, and that his opinion was final as no appeal was taken to the head of the department concerned. This opinion was concurred in by one other judge, Chief Justice Whaley. However, these two judges said, "Except for this, plaintiff would be entitled under the findings to recover $7,787.12, as set forth in Findings 16 and 17."

Another judge, Judge Jones, who at the time of the trial was on leave of absence from the court and was engaged as War Food Administrator, filed what was designated as a concurring opinion[1] (R. 34). He disagreed with the reasons given by the other two of his colleagues who held that petitioner could not recover. He apparently disagreed with their conclusion that the facts of this case presented

[1] It is submitted that this Court can take judicial notice of the fact that Judge Jones of the Court of Claims of the United States was, on October 4, 1944, on leave of absence from the court and was acting as War Food Administrator, and that he returned to duty on the court in June of 1945.

a dispute under the contract for the decision of the contracting officer. He also disagreed with their conclusion that except for the decision reached by the contracting officer petitioner could recover. He went further and found petitioner "at fault" though he makes no reference to the findings of fact that justify such a conclusion. If he agreed with the other two judges who found that petitioner was not entitled to recover, that the facts of this case presented a dispute under the contract, it was unnecessary for him to determine the merits or demerits of petitioner's conduct.

The other two judges of the court below, Judge Whitaker and Judge Madden, dissented, and each filed an opinion. Each held that under the facts of this case there was no dispute for the decision of the contracting officer; that plaintiff was not guilty of any negligence and, hence, it should recover.

There is therefore presented to this court, with the request that it review it, an anomalous situation. Four judges have found petitioner not guilty of negligence in breaking the water main; one judge has found that it was at fault. Three judges hvae indicated that the case did not present a dispute for the decision of the contracting officer. Two judges have found that it did. Therefore, without a majority of the court below agreeing upon either of the questions presented by the facts and circumstances of this case, petitioner is denied recovery.

Two distinct questions confronted the court below after it made its determination of the facts. Both were questions of law. The first question, a preliminary one, was whether under the facts as found there existed in May of 1935 a dispute between petitioner and respondent *under the contract* for the determination or decision of the contracting officer. The second question, the real question in the case, was—Did

petitioner negligently damage respondent's property and, hence, is it liable for the cost of repairing that damage? Stated another way, if it got by the first question the court had to determine whether or not, upon the facts as found, petitioner acted as any ordinarily prudent contractor would have acted under the circumstances.

After a trial, attended by only four of the judges, two judges decided the first legal question against petitioner. The other two judges decided it in favor of petitioner. All four of the judges decided the second legal question in favor of petitioner. The fifth judge, upon his return to the court many months after the trial, made no specific finding as to the first question but inferentially decided it in petitioner's favor by going into the merits of petitioner's conduct and predicating his conclusion that petitioner could not recover upon his determination of the second question. He disagreed with the other four judges and found petitioner at fault.

A motion for a new trial was filed in the court below. That motion was denied without opinion.

Questions Presented

1. What is the scope and meaning of the term "disputes concerning questions arising under this contract" as used in Article 15 of the Standard United States Government Form of Contract?

2. Does the contracting officer have the right to determine under Article 15 of the Standard United States Government Form of Contract that a contractor negligently damaged government property and, therefore, must respond in damages, particularly when the contractor under its contract was not required to handle or touch the item of property damaged?

3. Under Article 15 of the Standard United States Government Form of Contract is the decision of a contracting officer, from which no appeal is taken, on a question of law binding and conclusive upon the Court of Claims of the United States? Can such a question be made the subject of final determination by an administrative officer of the government?

4. If Article 15 of the contract was intended to apply to the facts and circumstances of this case, could it validly be agreed to by the parties?

5. Are the essentials of due process met in a case such as this where the majority of the Court of Claims of the United States has not decided either of the two questions involved in the case against petitioner, yet recovery has been denied?

Reasons Relied On for Allowance of the Writ

1. To avoid further confusion this Court should take this case and clarify the question as to what is a dispute arising under a contract within the meaning of Article 15 of the Standard United States Government Form of Contract. The effect of the opinion of two of the judges below, which has been treated as a majority opinion although apparently not concurred in by the three other members of the court, is to hold that any disagreement, whether it be legal or factual, between a person holding a government contract and the government comes under the contract and can be conclusively determined either by the contracting officer or the head of the department concerned. If that opinion is upheld the jurisdiction of the Court of Claims is limited only to those decisions fraudulently determined by the contracting officer or the head of the department, or those so grossly erroneous as to imply bad faith. See R. 33.) The

fact that confusion reigns is clearly indicated by the three opinions filed in this case dealing with this question.

2. The opinion of the two judges who held that petitioner should have appealed to the head of the department concerned is in direct conflict with the decision of the Court of Claims in the case of *Beuttas* v. *United States*, 101 Ct. Cls. 748, decided after the decision of this Court in the case of *United States* v. *Blair*, 321 U. S. 730, and the case of *Langevin* v. *United States*, 100 Ct. Cls. 15, decided just prior to it.

3. Certiorari was granted in the case of *Beuttas* v. *United States, supra*, by this court at the request of the government. By its petition in that case the government recognized the importance of the questions raised by this petition. Upon consideration of that case upon its merits this Court, in *United States* v. *Beuttas*, 324 U. S. 772, decided on April 23, 1945, found it unnecessary to decide the questions raised herein as it felt that that case could be disposed of on other grounds. In that case this Court said:

> "The respondent's contention is that if Article 15 be construed to cover such a dispute it is void as an attempt to oust the jurisdiction of the Court of Claims to decide a pure matter of law, namely, whether on the facts found, the petitioner had broken the contract."
>
> * * * * * * *
>
> "The parties devoted much of their argument here to the question whether only questions of fact, or questions of mixed law and fact can by contract be made subject to final determination by an administrative officer of the government or whether a question of law may also, by contract, be made subject to final determination by such an officer. Our cases have not specifically drawn any distinction between the two categories. * * *"

The Court of Claims has drawn a distinction but has done so inconsistently. Compare the case at bar with *Beuttas v. United States,* 101 Ct. of Cls. 748.

4. It is respectfully urged that this Court should determine and delimit the authority of the contracting officer and head of the department concerned to act under Article 15 of the Standard United States Government Form of Contract. Questions raised in this case are of primary importance in the field of government contracts. This Court should settle the issues herein raised and give the court below a guide that will permit it to know how much of its jurisdiction has been usurped by the government departments that employ the Standard United States Government Form of Contract involved in this case.

5. This Court should also determine the question as to whether or not three judges of the Court of Claims of the United States must concur on any given point before a decision can be reached. The court is one of original jurisdiction. The rules of that court designate the hearing before the court as a trial. As heretofore indicated, there were two issues in the case before the court below, and a majority of the court in each instance has, inferentially at least, determined both of those issues in petitioner's favor, yet recovery has been denied. While this question appears to be unique insofar as the Court of Claims of the United States is concerned, the question is an important one and one with substantial ramifications affecting both administrative procedure before many Commissions and hearings before three-judge courts.

6. The uncertainty resulting from the diverse views in the opinions below calls, we submit, for the exercise of this Court's power of review. At the present time, under the existing decisions of this Court and the court below,

it is difficult to determine what is required of a contractor or what is required of a contracting officer or head of a department concerned in the event of a dispute, and much uncertainty exists as to what, if any, jurisdiction the Court of Claims of the United States has left over controversies between a contractor and the government where the contract contains a provision similar to that of Article 15 involved in the instant case. Since the court below is, for all practical purposes, the exclusive forum for the settlement of claims against the United States, a review by this Court is important to resolve the divergencies in the opinions below, not only for the sake of this case but more generally in the interest of certainty and uniformity of decision. Compare the grant of certiorari in *Landis* v. *North American Company*, 299 U. S. 248, in *John Hancock Insurance Co.* v. *Bartell*, 308 U. S. 180, and *Federal Communications Commission* v. *National Broadcasting Company, Inc., et al.*, 319 U. S. 239.

Conclusion

For the reasons stated, it is respectfully submitted that this petition should be granted.

GEORGE F. DRISCOLL COMPANY,
Petitioner.

By JOSEPH J. COTTER,
JAMES C. ROGERS,
ARTHUR J. PHELAN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1034

GEORGE F. DRISCOLL COMPANY, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Statement of the Case

A statement of the facts and questions involved will be found in the petition for writ of certiorari.

II. Specification of Errors

The Court of Claims of the United States erred:

1. In denying recovery to petitioner under the facts and circumstances of this case;

2. In failing to hold that under the facts and circumstances of this case the questions raised as a result of the breaking of the water main were for the determination of the court below and not for the contracting officer;

3. In determining that the decision of the contracting officer was final and conclusive as to questions of law;

4. In failing to hold that petitioner was not bound by the decision of the government's construction engineer;

5. In failing to enter judgment for the petitioner in view of the fact that four judges determined petitioner was not guilty of any negligence and three judges, in effect, held that under the facts and circumstances of this case the contracting officer had no jurisdiction to determine the question of who was liable to respond in damages as a result of the breaking of the water main.

III. Argument

The questions involved in this case cannot be better argued or presented than they are in the two dissenting opinions filed in the court below. As was said by Judge Whitaker, the work of repairing the broken water main was not a part of petitioner's contract for the construction of certain buildings on Ellis Island and, hence, it was not governed by its terms; and the provisions of Article 15 of the contract between petitioner and respondent had no application to the dispute as to who should pay for the cost of repairing the broken water main.

It should be borne in mind that there was no dispute in this case until the question of who was to pay for the damage to government property arose.

Let us assume that petitioner, following the breaking of the water main, had refused to repair it and the government had repaired it at its own expense. No one would contend that the contractor's refusal to repair the main resulted in a breach of its contract to build certain buildings on Ellis Island. In order to recover the expense incident to repairing the main the government would have

had to sue the petitioner in a court of law for damages on the ground that it negligently broke the main. Petitioner would have denied negligence, and the case would have been tried as any other negligence case irrespective of what attempts the contracting officer had made to decide the issue.

If, in the event the contractor had refused to make the repairs, the government had withheld from the contract price its cost in making the repairs, the contractor would have sued in the Court of Claims for monies due under its contract, and the government would have had to file a counterclaim or setoff for the cost of the repairs. The contractor would, of course, have denied negligence, and the burden of proving it would have been on the government.

As was clearly pointed out in the dissenting opinion of Judge Madden, the issue between the parties following the break of the government water main was whether petitioner's breaking of the main was negligent or tortious and, if so, whether the concurrence of the government's agent in the petitioner's conduct was such as to prevent the government from recovering its loss from the petitioner. In other words, was there contributory negligence or was the government estopped to deny liability because of its acquiescence in everything that was done? It should be remembered that the new location of the main was selected by the government's engineer, that the probing was done in his presence, and that following the probing permission was given to drive the pile and the pile was driven in the presence of the government's assistant construction engineer.

In the opinions below some confusion seems to exist as to whether the decision of the construction engineer or that of the Director of Procurement constituted the decision of

the contracting officer. However, it makes very little difference. The government's Construction Engineer did not decide the question of negligence nor did the head of the Procurement Division. The former decided that certain provisions of the specifications had not been followed and that if they had been the damage to the water main would not have occurred. He does not specify in what respect or in what particulars petitioner failed to comply with those paragraphs of the specifications. The court below did not find as a fact that petitioner failed to comply with any of them.

Although he is designated as such by the opinion of Judge Littleton, there is no finding that the Director of Procurement was the contracting officer, nor is there any finding that the Director of Procurement was not the duly authorized representative of the Secretary of the Treasury. Regardless of this, there is no finding as to the basis for his conclusion that the contractor must assume the additional expense incurred in the repair of the main.

A reading of those paragraphs of the specifications referred to by the construction engineer in his decision shows clearly that none of them had any application to the situation that confronted petitioner and the government's engineers just prior to the driving of the pile and after the breaking of the main (See R. 22-24). Judge Madden construed the opinions of the government representatives to mean that the specifications required petitioner to keep the water running through the water main regardless of what happened to it (see paragraph 987 of the Specifications, R. 23) and therefore petitioner, in repairing the main, did no more than was required of it by the contract (R. 37).

The only paragraph of the specifications that could possibly have any bearing is paragraph 987 (R. 23). That provision provided that petitioner was to maintain water

service to the existing buildings on the island during the course of construction. As Judge Madden says, however, the contract provision concerning the maintenance of the water service had nothing to do with the questions involved in this case.

The absurdity of construing paragraph 987 of the specifications to mean that petitioner was to supply water to Ellis Island at its own expense after the breaking of the main is apparent when a hypothetical case is considered. Let us assume that the water main was broken by some third party at a point in the bottom of the river between the island and the Jersey shore. It is submitted that even the contracting officer by any stretch of his imagination could not have decided that petitioner had to go, at its own expense, into the river, find the break, repair it and, at the same time, supply water by tugboat to the island.

In any event, the question of the interpretation of the specifications as applied to the situation existing on Ellis Island May 1, 1935 is purely a legal one and not one for the determination of the contracting officer.

In the opinion of Judge Littleton filed in this case he says that the contracting officer decided that petitioner and not the government was responsible for locating the water main before driving the pile which resulted in its being broken, and that the Court of Claims was bound by that decision. The finding is that the construction engineer suggested that that be done, that the contractor objected, and that the government engineer then directed that another procedure be followed (R. 26). There is no finding of fact to support the conclusion of Judge Littleton. In any event, assuming that the conclusion reached by Judge Littleton is correct as to the basis of the contracting officer's decision, the interpretation of the contract so as to determine the responsibility of either party to respond in damages presents a legal question

which, it is submitted, cannot be for the decision of the contracting officer or the head of the department concerned.

IV. Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in that the questions here involved may be permanently settled by this Court and a proper construction and interpretation made of Article 15 of the Standard United States Form of Government Contract, and that the confusion existing now in the minds of contractors, government departments, and the judges of the court below be cleared up; and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Court of Claims of the United States and finally reverse it.

JOSEPH J. COTTER,
JAMES C. ROGERS,
ARTHUR J. PHELAN,
Counsel for Petitioner.

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CITATIONS

693965—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1034

GEORGE F. DRISCOLL COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the judges of the Court of Claims (R. 31–38) are not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 1, 1945 (R. 38). A motion for a new trial, filed by petitioner on November 29, 1945 (R. 38), was denied by the court below on January 7, 1946. The petition for a writ of certiorari was filed on April 1, 1946 (R. 39). The jurisdiction of this Court is invoked under Section

3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether, under the provisions of Article 15 of a standard form Government contract, an unappealed determination by the contracting officer that it was the contractor's duty, under the contract provisions, to locate underground water installations so as to avoid their breakage and the consequent interruption of water service, and that the United States had not, in the circumstances of this case, relieved the contractor of that duty, was final and conclusive upon the contractor's right to receive reimbursement for expenses it incurred in repairing such a break and supplying interim water service.

CONTRACT PROVISIONS INVOLVED

The contract provisions involved are set forth in the Appendix, *infra,* pp. 15–16.

STATEMENT

On October 22, 1934, petitioner entered into a construction contract with the United States, acting in this respect by the Acting Director of Procurement, Treasury Department, to erect two buildings and to effect additions and alterations to others on Ellis Island, New York (R. 6–20). As the existing buildings were to be occupied during the performance of the contract, paragraph 987 of the contract specifications (*infra,*

p. 16) required petitioner, during the period of such performance, to "maintain the cold water, hot water, sewers, * * * and all other services * * * supplying these buildings." Paragraphs 988 and 989 of the specifications further provided as follows:

> 988. Especial attention is called to the fact that piping, conduits, and traps, etc., in place in present covered walks, etc. are not shown on drawings, and bidders should visit site to fully inform themselves of the conditions.
>
> 989. When services are encountered in excavations, etc. (including excavations for buildings) they must be offset and reconnected by this contractor so as to furnish uninterrupted services to the occupied buildings. Any abandoned or dead service pipes encountered must be removed to outside of excavation and be plugged tight as directed.

On May 1, 1935, petitioner was engaged in constructing the foundation wall of a covered passage between two buildings which, as required by the contract, was to be supported upon piles to be driven at points designated by the construction plans furnished petitioner (R. 25). After a number of such piles had been installed on six foot centers, petitioner approached a point where it appeared that the next pile to be driven would be very close to the supposed location of an underground water pipe. This main was known to

enter the Island at a point approximately 100 or 125 feet distant from the line along which petitioner was proceeding to drive the piles, and to be connected to a vertical riser, appearing above ground some five feet the other side of that line. On the assumption, which later proved incorrect, that the main followed a straight line between these two known points, it appeared to petitioner that the pile it was about to drive might break the main. (R. 26.)

Accordingly, a conference was held between various of the contractor's and Government's construction supervisors (R. 26). Neither party had any information as to the underground depth of the main at the point at which the pile was to be driven, although it was known to enter the Island at a depth of approximately 23 feet (R. 25, 26). Information on this question was sought from the assistant superintendent in charge of Ellis Island, who stated that he thought the main would be found at that point to be some 10 feet below the surface (R. 27). The Government's construction engineer at first suggested that petitioner dig down to the pipe and there make a connection with it which petitioner was in any event required to do under its contract (R. 26). Petitioner demurred on the ground that an excavation of this size would be unnecessary since the new pipes it was required to connect with the main were to be laid at a depth of only three feet, and that this could be accomplished by making

the connection with the vertical riser at that level (R. 26, 27). In view of this objection, the Government's construction engineer then indicated a point two and one half feet away from the original point at which the pile was to be driven, and instructed petitioner to drive the pile at that point. The permission thus given petitioner to deviate from the plans was expressly conditioned upon instructions that petitioner probe the ground before driving the pile to determine whether it would strike the main. (R. 27.)

Following receipt of these instructions, petitioner's workmen probed for the main to the depth of sixteen feet six inches without encountering it. Petitioner then obtained authorization from the Government's assistant contruction engineer to drive the pile at the new point,[1] and, in so installing the pile, struck and broke the main at a depth of sixteen and three quarters feet—some three inches below the lowest point to which petitioner had probed. A complete failure of the water supply to the existing buildings resulted. (R. 27.)

As soon as the fact that the main had been broken became apparent, petitioner was orally instructed by the Government's construction engineer to repair it (R. 26–27). Petitioner immediately commenced repair operations and re-

[1] Paragraph 108 of the Specifications (*infra*, pp. 15–16) required that all piles be driven in the presence of the construction engineer.

connected the main on May 7th (R. 28). In the meantime, petitioner supplied water to the Island first by tugs and later through a rented hose line extending from the New Jersey shore (*id.*).

While the repair work was in progress, petitioner, on May 3, 1935, wrote the Government's construction engineer making claim to reimbursement for the costs of the repairs in the event "it is established that the main is not as indicated on the drawings * * *" (R. 28). The reply of the construction engineer, dated May 11, 1935, called attention, *inter alia,* to Sections 987, 988 and 989 of the specifications (see *supra,* p. 3), and stated (R. 29):

> If all the above-mentioned paragraphs of the specifications had been followed, the damage to the water main would not have occurred, and it is the writer's opinion that there can be no possible claim for additional compensation for the repair of this damage.

On June 5, 1935, following completion of the repair work, petitioner submitted a change proposal to the Procurement Division, Public Works Branch, requesting payment for the actual cost of the extra work involved, plus ten per cent of that sum for overhead and an additional ten per cent for profit, or in all $8,478. On September 16, 1935, petitioner was informed by the Procurement Division that, following an investigation of the matter, its claim was rejected. The letter of

the Procurement Division further stated that no objection would be interposed by that Division should the petitioner desire to appeal its decision to the Office of the Comptroller General. (R. 29.)

Article 15 of the contract provided that, with the usual exceptions, "all other disputes concerning questions arising under" the contract should be decided by the contracting officer, subject to written appeal, within thirty days, to the head of the Department concerned whose decision on the matter should be final and conclusive as to such questions. Petitioner took no appeal from the adverse decision of the Procurement Division to the Secretary of the Treasury. On July 16, 1937, some twenty-two months after the decision of the Procurement Division, petitioner referred the matter to the Comptroller General (R. 5), who denied the claim on May 12, 1939 (R. 5, 30).

The instant action was commenced by petitioner on May 21, 1941, to recover the expenses it incurred in repairing the main and supplying interim water service. The complaint (R. 1–6) alleged as a sole basis of recovery that certain drawings furnished petitioner by the Government had incorrectly located the main, that petitioner had been misled thereby, and that the break "was not due to any negligence or lack of care or precaution on the part of plaintiff" (R. 2–3).

693965—46——2

The court below made the following findings with respect to the contract drawings (R. 25):

> 6. Paragraph 1 * * * of the specifications lists by number the contract drawings, one of which relates to plumbing and heating and is largely diagrammatic in character.
>
> * * * * *
>
> This diagrammatic drawing gave no dimensional data which would indicate the location of the existing underground water main with reference to the wall of the passageway, [or] the depth of the same underground * * *.
>
> 7. Another contract drawing * * * disclosed in no way either the supposed or actual location of the underground water main with reference to the wall of the passageway and the required pile work therefor.
>
> 8. Paragraph 2 * * * of the specifications referred to a second set of drawings by number. This paragraph made reference to these drawings as relating to conditons of the site and stated with reference to them that they—
>
> > are not to become contract drawings. They are furnished bidders only for such use as they may choose to make of them. The accuracy of data given on these drawings is not guaranteed.

Two judges of the court below held that petitioner's claim was precluded under the terms of

Article 15 of the contract because of its failure to appeal from the adverse decision of the contracting officer, issued on September 16, 1935 (R. 31–34); a third judge concurred on the ground that the contract obligations required petitioner to probe to the full depth that the pile was to be driven before proceeding to do so (R. 34–35). Separate dissenting opinions were filed by the other two judges of the court below (R. 35–36, 36–38).

ARGUMENT

Petitioner urges (1) that its claim to reimbursement for its expenses in repairing the main and furnishing interim water service did not present a dispute "concerning questions arising under" the contract within the meaning of Article 15, and (2) that if Article 15 was intended to apply, the decision thereunder involved solely a matter of law as to which the parties could not validly agree to be bound by the ruling of "an administrative officer of the government." (Pet. 8, 9.)[2]

[2] Petitioner's remaining question presented, whether it was denied "due process" because the opinions filed by the judges concurring in the judgment revealed divergent theories for denying petitioner recovery, is obviously without merit. The holding that the petitioner is not entitled to the relief sought, having been concurred in by the majority of the court below, became the judgment of that court. Compare the situation presented by the affirmance by an equally divided court of a judgment entered by an inferior court.

1. Petitioner's request of the Government's construction engineer for a change order reimbursing it for the expenses incurred, and the engineer's denial of that request, clearly generated a dispute "concerning questions arising under this contract." Moreover, the fact that the claim for reimbursement was made after the event (Cf. Pet. 14) cannot obscure the fact that the dispute turned initially upon the question of whether petitioner, under the terms of the contract, was under an affirmative duty, in the course of its construction work, to locate underground water installations so as to avoid their breakage and the consequent interruption of water service to the Island. Had petitioner objected to the instructions it received on May 1, 1935, to probe for the main before driving the pile on the ground that the Government was under an obligation to inform it of the precise location of the main, the issue thus raised would have required a determination of the Government's and the contractor's respective obligation in this respect. The dispute actually arising over petitioner's claim to reimbursement required that the same determination be made. For the solution of that issue, reference necessarily had to be made to the provisions of the contract. Whether these provisions applied or controlled was peculiarly a matter for the determination of the contracting officer. The competence of a contracting officer under Article

15 to resolve disputes as to the duties placed upon a contractor by the terms of the contract as "questions arising under the contract" has repeatedly been recognized by this Court, and the officer's ruling thereon, absent a showing of bad faith or of error so gross as to imply bad faith, is conclusive.[3] See, *e. g.*, *United States* v. *McShain*, 308 U. S. 512; *Plumley* v. *United States*, 226 U. S. 545; *Ripley* v. *United States*, 223 U. S. 695; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387.

While petitioner states (Pet. 4) that the contract specifications had no application to the question of petitioner's obligations with respect to underground installations, we submit that the terms of the contract squarely placed petitioner under an affirmative duty to avoid breakage of such facilities. An awareness that the presence of underground structures would present difficulties with respect to the construction work to be performed by the contractor is repeatedly demonstrated by the terms of the contract. The responsibility for their avoidance was impliedly if not specifically placed on the contractor by

[3] Petitioner makes no specific argument, nor did it below (R. 33), that the ruling of the contracting officer was arbitrary, capricious, or grossly erroneous. As before stated, the petition it filed below sought recovery on the sole ground that the drawings furnished it did not correctly place the main and that petitioner, in justified reliance thereon, had been misled to its detriment. This contention is entirely disposed of by the findings below. See *supra*, p. 8, R. 25.

paragraph 987 of the specifications which required petitioner to "maintain the cold water, hot water, sewers * * * and all other services * * * supplying" the existing buildings (*infra,* p. 16, R. 23). Equally significant is paragraph 988 of the specifications which called "especial attention" to the fact that the location of these installations was not shown on the contract drawings (*infra,* p. 16, R. 23). Such drawings as did contain any data with respect to them were "not to become contract drawings" (Specifications, paragraph 2, *infra,* p. 15, R. 25). They were "furnished bidders only for such use as they may choose to make of them", and the accuracy of the data contained therein was not guaranteed (*id.*). These admonitory paragraphs, it is submitted, could have had no other purpose than to advise the contractor that the Government neither knew nor assumed responsibility for the location of the underground pipes but instead placed that responsibility on the contractor.

Having decided, correctly we submit, that the contract required petitioner to locate the main, the contracting officer was faced with a further question—whether the action of the Government's construction engineers, on May 1, 1935, released petitioner from such duty and constituted a Governmental assumption of the risk of breaking the main. This involved a resolution as to a disputed issue of fact with reference to the scope of the

contracting officer's authorization to proceed, and as to which the unappealed decision of the contracting officer was patently conclusive under the provisions of Article 15. *United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61; *United States* v. *Blair*, 321 U. S. 730, 735–737.

2. Petitioner's contention to the contrary notwithstanding (Pet. 10–11), this case does not raise the same issue as that involved in *Beuttas* v. *United States*, 101 Ct. Cls. 748, reversed, 324 U. S. 768. In that case, the contractor had exhausted the remedies provided it by Article 15 by appealing to the department head; here, however, petitioner took no appeal to the Secretary of the Treasury.[4] Whatever the finality of Article 15 with respect to pure questions of law, and whatever the validity of petitioner's contention that the issue between it and the Government was purely one of law (cf. R. 33), it is clear that Article 15 validly requires an exhaustion of the administrative remedies made available therein. If this were not so, the Government would be denied the opportunity to correct the improper

[4] Petitioner's reiterated reference (Pet. 5, 15, 16) to the fact that there was no finding below as to the identity of the contracting officer or the Department head would seem pointless. The first paragraph of the contract (R. 6) identifies the contracting officer as the person "executing this contract", *i. e.*, the Acting Director of Procurement, Treasury Department (R. 20). It is equally apparent that the "head of the Department concerned" was the Secretary of the Treasury.

action of subordinate officials. *United States* v. *Blair,* 321 U. S. 730, 735; *United States* v. *Callahan Walker Co.,* 317 U. S. 56, 61. Only after a fruitless appeal to the department head could the questions mooted in the *Beuttas* case be presented.

CONCLUSION

The decision below is correct and no conflict exists. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
PAUL A. SWEENEY,
BONNELL PHILLIPS,
Attorneys.

MAY 1946.

APPENDIX

Contract dated October 22, 1934, between the United States (Procurement Division, Treasury Department) and George F. Driscoll Company (contractor). Article 15 reads as follows:

> ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

Specifications of the aforementioned contract, Nos. 2, 108, 987, 988, and 989, read as follows:

> 2. Drawings Nos. 1–400 to 1–409 inclusive, 1–401–A, 1–403–A, 1–405A, 1–411, 1–412, 1–413, 1–P–450 relating to conditions of the site are not to become contract drawings. They are furnished bidders only for such use as they may choose to make of them. The accuracy of data given on these drawings is not guaranteed.
>
> 108. *Driving.*—Piles shall not be driven until after the excavation is completed.

Piles shall be driven to the required bearing value or values as determined by the formula for bearing values specified herein. All piles shall be driven in the presence of the Construction Engineer. The driving shall be continuous for each pile from the time of starting until the required bearing value has been reached. Caps, collars or bands shall be provided and used as necessary to protect the piles against splitting and brooming.

987. *Present Service Pipes, etc.*—All the buildings now on the site will be occupied during the construction of the buildings, etc., under this contract and this contractor must maintain the cold water, hot water, sewers, steam supply, electric services, and all other services not mentioned herein, supplying these buildings.

988. Especial attention is called to the fact that piping, conduits, and traps, etc., in place in present covered walks, etc., are not shown on drawings, and bidders should visit site to fully inform themselves of the conditions.

989. Where services are encountered in excavations, etc., (including excavations for buildings) they must be offset and reconnected by this contractor so as to furnish uninterrupted services to the occupied buildings. Any abandoned or dead service pipes encountered must be removed to outside of excavation and be plugged tight as directed.

U. S. GOVERNMENT PRINTING OFFICE: 1948

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1034.

GEORGE F. DRISCOLL COMPANY, *Petitioner*,

v.

THE UNITED STATES.

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On Petition for Writ of Certiorari to the Court of Claims.

ALLEN POPE,
amicus curiae.

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On Petition for Writ of Certiorari to the Court of Claims.

Submitted with consent of

The Honorable J. HOWARD MCGRATH, *Solicitor General of the United States, for respondent.*

ARTHUR J. PHELAN, Esquire, *for petitioner.*

Comes now Allen Pope, and, having consent of both parties herein, respectfully requests permission to submit the following brief as an *amicus curiae.* He has special interest in the principles here involved as they apply to two pending cases in which he is litigant as appears next below.

Your *amicus* is not a member of the bar of this Court. In such respect his brief may not meet precisely the require-

ment of Rule 27, par. 9. He is a contractor for engineering construction. He has two pending cases involving the important and novel principles at issue in this case, *i. e.*, in what it purports to decide and how it was decided. In each such case, he now represents himself. Both of his pending cases, as also this case, are claims against the United States for work performed upon its requirement, of which it has received the benefit, but for which it has not paid. One pending case, No. 46476 in the Court of Claims turns on similar contract provisions, especially with respect to Article 15, *Disputes*. There, as here, the issue stems from the power, or lack of it, of administrative officials to decide conclusively points of law arising from a contract. It is also observed that one judge is still absent from the court. As to this circumstance see post p. 3. The other pending case, No. 45704 below, No. 520 present term here, involves similar issues of substantive law, but the most important aspect is the similarity of procedure, the issue of adjective law, whereby judgment was given by a majority of three, one of whom did not hear the oral argument, was absent from the court for nearly three years; it being remembered that in that court the *nisi prius* is the court, and that no review may be had except by certiorari here. Motion for leave to file, and a second petition for rehearing therein are nearly ready for submission. Thus far the interest herein of *amicus* in respect of his own cases.

BRIEF OF ALLEN POPE, AMICUS CURIAE.

The thesis of this brief is sufficiently observable in the conclusion hereto to which reference is respectfully made in order to save repetition.

STATEMENT.

The proceedings below were as follows: Four of the five judges of the Court of Claims heard the case argued on October 4, 1944. All of the five judges were qualified and

had jurisdiction to hear, determine, and render judgment. The fifth judge did not hear the oral argument. He was absent from the trial. He was absent from the court for nearly three years and did not return until June 30, 1945, when the court was in summer recess. "Any three of the judges of said court shall constitute a quorum, and may hold a court for the transaction of business; *Provided*, That the concurrence of three judges shall be necessary to the decision of any case." 18 Stat. Chap. 468; United States Code, 1940 Edition, p. 2514, § 243 (Judicial Code Section 138). U. S. C. A. is misleading. The four judges who heard the oral argument disagreed on a point of law which two of them considered decisive of the case such as to warrant dismissal. They held that, right or wrong, the decision of the administrative official, purportedly made under authority of Article 15 of the contract, was conclusive upon the court (R. 33). The said Article 15 provides that all questions arising under the contract shall be determined by the contracting officer (R. 14). As matter of law, the contracting officer decided that petitioner was not entitled to be paid. The said two judges upheld this decision of the officer (R. 33). They also drafted Special Findings of Fact.

For nearly a year, three judges could not concur. The fifth and theretofore absentee judge was called in. He was also called in in three other cases, of which one was that of *amicus*, and where, likewise, the quorum of four which heard them stood divided two and two. These were cases No. 45,596, *Minette G. Stein* v. *The United States;* No. 45,704, *Allen Pope* v. *The United States;* and No. 45,889, *Pennsylvania Company et al* v. *The United States.* Without giving any notice to the parties or opportunity to be heard before the full bench or before the deciding judges, the court on October 1, 1945, decided all these cases against the claimants, and did so by means of the vote of the theretofore absentee judge as supplying the requisite third vote for concurrence. In the meantime and prior to October 1, 1945, one of the other judges who dissented was given an outside ad-

ministrative assignment not connected with the court and is still absent thereon.

The court, or a minority thereof, could have certified the disputed issue of law to this Court for decision under authority of the Act of February 13, 1925, Sec. 3 (a), Rule 40, but they did not (See post p. 8). They had the same power to certify the questions in the other three cases above mentioned, where, also, the quorum of four was divided two and two, but they did not use it. Instead, they referred the matters to the absentee judge. In effect, he decided them all in that his vote brought about the judgments of dismissal.

In the instant case, the theretofore absentee judge concurred in the result, *i.e.*, in the judgment of dismissal. He gave as ground his own statement of fact and his own and different conclusion of law. Neither his fact nor his law was sustained by any evidenciary finding, and was not concurred in by any other judge. The two remaining judges dissented on points of law, contending that petitioner was entitled to be paid. Each wrote a dissenting opinion. The judgment is that the petition be dismissed; but, by reason of the divergence of grounds, the law of the case is not made.

The Special Findings of Fact as incorporated in the judgment may be questioned as to their validity and as to whether actually they are findings in the following respects. No concurrence thereto is expressly indicated. Neither has the court stated, as is its custom, *The Delaware, Lackawanna & Western Railroad Co.* v. *The United States*, 54 Ct. Cls. 35, 38, that the facts as thus found were based on the evidence, on the report of a commissioner, and upon being "heard" by the court. One judge, who ordered dismissal, did not hear the oral argument. That fact bears upon the issues of "hearing" and of the validity of the judgment. See Discussion post p. 9. On the other hand, no judge recorded any opposition to the findings as written.

The pertinent essence of the Special Findings of Fact as set out is as follows (R. 22-31):

Petitioner, under a contract drafted on Standard Government Form No. 10, agreed to construct a building at Ellis Island. He agreed to maintain the water supply when making piping installations. He also agreed to be responsible for damage resultant from his fault or negligence. He agreed to drive some small piles for the support of a covered passage-way, the same to be spaced 6 feet apart and in the locations shown on the contract plan. The piles were specified to be driven, not by length, but to a designated "bearing value" determined from a formula and to be computed by the government's representative as the piles were continuously driven in his presence. The location and depth of the underground water main as it crossed the site of the covered passageway were not definitely known. The Government possessed whatever knowledge there was in such respects. There was no express contractual provision requiring petitioner to explore for the pipe.

When, in the course of the pile driving pursuant to the contract plan, a pile was about to be driven in the vicinity where the underground pipe was thought to be, the contractor asked the Government's representative for instructions. The latter decided to move the location of the pile 2 feet 6 inches from the location agreed in the contract and shown on the plan. Following his instructions, the petitioner, having dug a trench five feet deep at the changed location, probed in the bottom thereof at intervals of 4 inches using a steel rod 12 feet long and allowing 6 inches for hold. The contractor thus probed to depths of 16 feet 6 inches below the surface of the ground. The underground pipe was not found.

The Government's representative thereupon designated the changed location by a stake; ordered the contractor to drive the pile thereat; supervised the driving; and directed the contractor when to stop driving. There was then no

indication that the pile had caused damage. Subsequently, the water pressure began to drop and the following morning there was no pressure. Thereupon, the government's representative ordered the contractor to excavate for purposses of investigation and repair. The contractor proceeded as directed, but immediately, in writing, requested reimbursement for the outlay being incurred. The Government's representative by letter confirmed his order to do the work.

The pipe was found damaged at a depth of 16 feet 9 inches below the ground, or 3 inches below the probings. The pipe would not have been damaged had the Government's representative permitted the pile to be driven in the agreed location as shown on the plan. The pipe was repaired and the water supply maintained as directed. The contractor followed instructions in all respects. The total expense was as the findings show which corresponds with the pleading.

Article 15 provided for decision by the contracting officer of all questions arising under the contract. After performance of the work upon his requirement and with full daily knowledge of the expense being incurred, the contracting officer, upon the authority of this Article 15, decided that the contractor was responsible. He so held notwithstanding that the Government, of its own decision, changed the location shown by the plan and actually directed the damage being done by requiring the pile to be hammered into position as it was. In such respect to the contrary see *Richard Wood et al* v. *City of Fort Wayne*, 119 U. S. 312. *Roettinger, Administrator of Clark* v. *The United States*, 26 Ct. Cls. 391. *Six Companies* v. *The United States*, 85 Ct. Cls. 687, 697. *Ambursen Dam Co.* v. *The United States*, 86 Ct. Cls. 478, 511. *Christensen Const. Co.* v. *The United States*, 72 Ct. Cls. 500, 516. *Callahan Const. Co.* v. *The United States*, 91 Ct.Cls. 538, 635. *Freund* v. *The United States*, 260 U. S. 60. This issue of law is not presently before the Court because the law of the case is not made.

REASONS WHY CERTIORARI SHOULD BE GRANTED

The judgment of dismissal *as it stands below* is a final judgment. In such respect, the case is within the jurisdiction of this Court. The judges disagreed as to the law. The judge, whose vote supplied the necessary third concurring vote, concurred only in the result, *i.e.*, the judgment of dismissal, and set out his own idea of fact and law. Wherefore, the law of the case is not made, and there is nothing here to review by way of issue of substantive law, *Fenstermaker* v. *Tribune Publishing Co.*, 12 Utah 430, 13 Utah 562, 35 LRA 611. *Burr* v. *Des Moines Co.*, 1 Wall. 99, 102.

It is questionable also whether the Special Findings of Fact as asserted are made in accordance with rules of court and law, *ante* p. 4, and whether, in such respect, any items of substantive law may be raised therefrom. *Burr* v. *Des Moines Co.*, 1 Wall. 99, 102, 103. However, since the disputes of the judges below turn entirely upon the meaning of the contract and since the lower court has sent up the contract as part of the record in the case, this Court may find as fact what the contract provisions were by virtue of the Act of May 22, 1939, amending the Act of February 13, 1925, and thereupon construe the same and direct the lower court to proceed and to render judgment accordingly. *The United States* v. *Esnault cases.* For such ground could not certiorari be granted?

When the Congress, upon the representations of members of this Court, "abolished" the right of appeal to the Supreme Court from judgments of the Court of Claims and substituted, in lieu thereof, a review on certiorari by Section 3 (b) of the Act of February 13, 1925, it was intended and expected that the Court of Claims would make use of Section 3(a) thereof and certify to this Court questions of law concerning which instructions were desired *for the proper disposition of a case.* While that authorization appears merely permissive in aid of the court, not obligatory, it was not intended that rights of claimants in that

court to the fundamental American tradition of having at least one review of their cases should be completely forfeit. It was intended that by the combination of certification and certiorari some of the essentials of the individual's rights to review should be retained. Every question in the Court of Claims, as a court of first instance, which might warrant review in a higher court, if there were such, is not a question of great national importance to be in the category of cases reviewable here. Thus it is possible, by the refusal or failure of the Court of Claims to decide or to certify, to squeeze out entirely, forever, what the Congress considered as the fundamental American rights of litigants even in that court.

It seems, from the language of the Act and from the testimony given at the hearings in Congress thereon, that in abolishing the right of appeal, it was intended that some balance be observed between certification and certiorari such as to "preserve" so much of that traditional American right to at least one review as would provide "for the proper disposition of a case". See testimony of Mr. Justice Sutherland, Senate subcommittee of the Committee on the Judiciary hearings on S. 2060, 68th Congress, 1st Session, February 2, 1924, p. 37 thereof; also pp. 38, 39, 47, Senator Spencer, Mr. Justice Van Devanter, Mr. Justice Sutherland. See also other hearings and reports in connection with this Act, e. g., Serial 45 Judiciary Com. House of Representatives on H. R. 8206, 68th Cong., 2nd Session, December 18, 1924, pp. 15, 17, note especially Mr. Sumners, Mr. Justice Van Devanter. Also see Senate Report No. 362 on S. 2060, 68th Cong., 1st, April 7, 1924; House Report No. 1075 on H. R. 8206, 68th Cong., 2nd, Jan. 6, 1925; Confidential Print. Senate Judiciary, Letter Chief Justice Taft, March 11, 1922, on S. 3164, 67th Cong., 2nd Sess. Also Wm. Howard Taft, 35 Yale Law Journal, 1, 9.

Was there no duty below to grant a rehearing before the judges who were to decide the case, or else to certify? That neither was done would seem to warrant certiorari.

This brief is aimed principally at the validity of the judgment. It is contended that the judgment is not a judgment at all; that it is invalid by reason of lack of required concurrence and lack of real hearing. This is the question of the "how" of the case, the question of procedural or adjective law raised simultaneously by the four decisions below of October 1, 1945, of which the present case was one.

The statute controlling decisions of the Court of Claims provides "that the concurrence of three judges shall be necessary to a decision in any case," *id.* Rule 75 (b) of the Court of Claims, originally promulgated by the Supreme Court, now retained by the lower court of its own authority under the revised statute, provides that that court's "special findings shall be in the nature of a special verdict." This is a technical legal phrase and has great import here. The *nisi prius* in the Court of Claims is the body of judges who hear and try the case. They serve as a jury. Statute provides they may be the full bench of five, but not less than three. This is a legislative court, not a constitutional court. While a jury of twelve is done away with, virtually a jury of at least three is substituted, and, it is believed, the essential requisites for jurors, juries, hearings, hearing of oral arguments, independent judgments thereon, not the hearsay of other jurors, unanimous concurrence of the triers, and all the connotations of the words, trial, verdicts, and special verdicts, are here retained.

Verdict: *Roberts* v. *State,* 159 So. 373, 374; 26 Ala. App. 331. *State* v. *Ivanhoe,* 57 P. 317, 320; 35 Or. 150. 44 Words and Phrases 131. 27 Ruling Case Law, 834, § 2.

Special Verdict: *Hutchison* v. *Kelley,* 1 Rob. (Va.) 123. *Davis* v. *Chicago etc. R. Co.,* 93 Wis. 470. 24 LRA (N.S.) 1. Bouvier's Law Dictionary p. 3392, 3393. *United States* v. *Clark,* 94 U. S. 73, 75. *Collins* v. *Riley,* 104 U. S. 322, 327. *Ward* v. *Cochran,* 150 U. S. 597, 608. *United States* v. *New York Indians,* 173 U. S. 464, 474 and a number of cases there cited. *United States* v. *Esnault Pelterie,* 299

U. S. 201, 205. Do 303 U. S. 26, 28, 29, 30 and numerous citations there. *Natron Soda Co.* v. *The United States,* 55 Ct. Cls. 66, 67. Clementson "Special Verdicts".

Concurrence of judges: Unanimous verdict: *Denver & Rio Grand R. Co.* v. *Burchard,* 35 Col. 539, 9 Ann. Cas. 994. *Capital Traction* v. *Hof,* 174 U. S. 1, 15. *Ebbing* v. *Borough of Schuylkill Haven,* 244 Pa. 505.

Juror. Jury. 23 Words and Phrases 419, 423. *State* v. *Potts,* 20 Nev. 389. *State* v. *Voorhies,* 12 Wash. 53. *State* v. *McCarthy,* 76 NJL 295.

Submission: *Ridgely* v. *Carey, Md.,* 4 Har. & McH. 167, 174.

Hearing includes oral argument: Trial ditto: *People* v. *Raco,* 47 N. Y. S. 2d, 448, 449. *Freeman* v. *United States,* CCANY, 227 F. 732, 743. *Chaffee* v. *Rahr,* 40 NYS 2d, 484, 488. *State ex rel Arnold* v. *Common Council,* 157 Wisc. 505, 510-512. *Wisconsin Telephone Co.* v. *Public Service Com.,* 232 Wisc. 274, 294. *Mason* v. *State,* 26 Ohio CC 535. *Barton* v. *Burbank,* 138 La. 997. *Durden* v. *People,* 192 Ill. 493. *Clanton* v. *Ryan,* 14 Colo. 419, 424. *McKenney* v. *Wood,* 108 Me. 335, 337. *Labonte* v. *Lacasse,* 78 N. H. 489, 490. *Bridges* v. *California,* 314 U. S. 252, 271.

CONCLUSION.

Certiorari, it is believed, should be granted because:

As the judgment stands, neither the law of the case nor the facts of the case are made, but, from the contract sent up as evidence, this Court may construe the same and direct the court below to render judgment accordingly. Act of May 22, 1939.

Congress intended that Sections 3(a) and 3(b) of the Act of February 13, 1925, should both be used for the proper disposition of a case in the Court of Claims. Not even one review may be had of a judgment of the Court of Claims. These two sections of the Act together were intended to protect a claimant in his fundamental American traditional right to at least that much review of a question

of law as is necessary to the proper disposition of a case below. Whence, proper circumstances arising for use of Sec. 3(a) but not used, certiorari should issue.

The judgment below is invalid, there being no concurrence of three judges in the sense required by the statute, 18 Stat. Chap. 468, nor concurrence in the sense implied by Ct. Cls. Rule 75 (b), nor as connoted by the terms verdict, special verdict.

The judgment below is invalid because one of the judges, who supplied the third concurring vote, was absent from the trial, did not hear the oral argument, which is an essential part of a hearing and of a trial. The *nisi prius* is the court. Just as jurors who have not heard the arguments may not decide the verdict, neither may absentee judges in the Court of Claims.

The case was not submitted on the transcript of evidence and the briefs, but on the oral argument.

This Court has jurisdiction. The questions presented are Federal in nature, of real substance, of wide application affecting virtually every litigant in the Court of Claims, and in all other courts where the *nisi prius* is the court. What about a United States District Court judge absenting himself from the arguments? Is that any worse than one of three judges being absent especially when the three are required to concur by law? The question is certainly novel in the Court of Claims. It never arose before October 1, 1945. It should not be permitted to arise again. The purported decision is contrary to virtually every other decision in that court based on substitution of obligations. The lower court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 38, par. 5 (b).

Respectfully submitted,

ALLEN POPE,
amicus curiae